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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JIMMY C. ROSE, WARDEN,
Petitioner,

vs.

STANLEY BARHAM CLARK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the state trial court's jury instructions on malice impermissibly shifted the burden of proving malice to the respondent?

2. Whether error in the state trial court's jury instructions on malice was harmless beyond a reasonable doubt?

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
Conclusion	12
Appendix:	
A - Opinion of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the district court	A-1
B - Order of the United States District Court for the Middle District of Tennessee	A-7
C - Opinion of the Court of Criminal Appeals of Tennessee	A-23
D - Order of the Supreme Court of Tennessee denying permission to appeal	A-40

TABLE OF AUTHORITIES

Cases Cited:

Burton v. State, 217 Tenn. 62, 394 S.W.2d 873 (1965)	12
Connecticut v. Johnson, 460 U.S. 73 (1983)	9

Conway v. Anderson, 698 F.2d 282 (6th Cir. 1983) 10

County Court of Ulster County v. Allen, 442 U.S. 140 (1979) 7

Cupp v. Naughten, 414 U.S. 141 (1973) 9

Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983) 10

Fox v. State, 1 Tenn. Crim. App. 308, 441 S.W.2d 491 (1968) 10

Graham v. State, 547 S.W.2d 531 (Tenn. 1977) 11

Lester v. State, 212 Tenn. 338, 370 S.W.2d 405 (1963) .. 12

Sandstrom v. Montana, 442 U.S. 510 (1979) ..... *passim*

State v. Adkins, 653 S.W.2d 708 (Tenn. 1983) 11

State v. Bolin, 678 S.W.2d 40 (Tenn. 1984) 6

State v. Bullington, 532 S.W.2d 556 (Tenn. 1976) 11

State v. Johnson, 541 S.W.2d 417 (Tenn. 1976) 10

Thomas v. State, 201 Tenn. 645, 301 S.W.2d 358 (1957) 12

Other Authorities Cited:

Tenn. Code Ann. §39-2401 [presently Tenn. Code Ann. §39-2-201] 2

Tenn. Code Ann. §39-2402 [presently Tenn. Code Ann. §39-2-202] 2

Tenn. Code Ann. §39-2403 [presently Tenn. Code Ann. §39-2-211(a)] 5

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit was filed on April 1, 1985, and appears as Appendix A.

The unpublished memorandum opinion and order of the United States District Court for the Middle District of Tennessee, granting the writ of habeas corpus, was filed on July 16, 1984, and appears as Appendix B.

The unpublished opinion of the Court of Criminal Appeals of Tennessee, affirming the trial court's judgment, was filed on February 27, 1981, and appears as Appendix C.

The unpublished order of the Supreme Court of Tennessee, denying discretionary review, was filed on November 30, 1981, and appears as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 1, 1985. This petition was filed within sixty days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Const. Amend. XIV, §1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The respondent, Stanley Barham Clark, was indicted by the Rutherford County Grand Jury for two (2) counts of first degree murder[1] in the slayings of Joy Faulk and Charles Browning. The proof presented before the jury, as summarized by the United States Court of Appeals for the Sixth Circuit, showed as follows:

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[1] Tenn. Code Ann. §39-2401 [presently Tenn. Code Ann. §39-2-201]:

> If any person of sound memory and discretion, unlawfully kills any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder.

Tenn. Code Ann. §39-2402 [presently Tenn. Code Ann. §39-2-202]:

> An individual commits murder in the first degree if:
>
> (1) He commits a willful, deliberate, malicious and premeditated killing or murder.

> In December of 1978, Charles Browning and Joy Faulk were shot to death while sitting in the cab of Browning's pickup truck in a rural area of Rutherford County, Tennessee. Faulk and Browning had a relationship which angered [respondent], Faulk's former lover. The night of the murders a police officer observed a brownish colored pickup truck belonging to Clark pursuing Browning's truck in the general vicinity of the homicides.
>
> The murder weapon, a .25 caliber pistol, was identified as belonging to [respondent's] friend, Terry Hill. [Respondent] had borrowed the handgun from Hill a few days before the shooting and had informed Hill that the gun had been stolen; it was found following the murders on a roadside near Clark's home.
>
> Faulk's two young children, ages six and three, were with Faulk and Browning in the truck the night of the shooting, and were found afterward wandering along a rural road seeking help. The older child testified at trial that 'Clicker' (a nickname for [respondent]) had followed them the night of the shooting and then had shot her mother and Browning. Her testimony was corroborated by what she had told others the night of the incident. The police located [respondent] in his truck near the driveway to his home after the shootings. Clark fled from the police and forced a high speed chase before the officers were able to apprehand him.

(Appendix A, at A-1 - A-2).

With varying degrees of proof, the respondent alternately claimed that he did not commit the crimes; that he suffered from temporary insanity at the time of the commission of the crimes; that he was intoxicated at the time of the commission of the crimes; and that he suffered from amnesia at the time of the commission of the crimes.

Following the taking of proof, the trial court charged the jury on the applicable law, including an instruction in accordance with the Tennessee Pattern Jury Instruction on malice:

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously, but this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant or exists in the evidence of the State.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts or cirucmstances. A 'deadly weapon' is any weapon or instrument which may from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury.
>
> * * *
>
> The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all of the facts and circumstances developed by the evidence to determine whether the State has proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the killing was done with malice, then the Defendant cannot be convicted of murder . . . and you must acquit him of that offense.

(Dist. Ct. Ex. 1, pp. 1087-1089).

The jury returned a verdict finding the respondent guilty of the first degree murder of Joy Faulk; punishment was assessed at life imprisonment in the state penitentiary. The jury also

returned a verdict finding the respondent guilty of the second degree murder[2] of Charles Browning; punishment was assessed at ten (10) years imprisonment in the state penitentiary.

On appeal, the respondent challenged, *inter alia,* the malice instructions on the ground that they impermissibly shifted the burden of proof on that element. The Court of Criminal Appeals of Tennessee rejected the respondent's contentions and affirmed the trial court's judgment. The Supreme Court of Tennessee denied the respondent's application for permission to appeal.

Subsequently, the respondent filed a petition for the writ of habeas corpus in the United States District Court for the Middle District of Tennessee, alleging that the trial court's malice instructions violated due process of law pursuant to *Sandstrom v. Montana,* 442 U.S. 510 (1979). The district court agreed with the respondent's contention and granted a writ of habeas corpus ordering the State of Tennessee to retry the respondent within ninety (90) days or release him. This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit.

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[2] Tenn. Code Ann. §39-2403 [presently Tenn. Code Ann. §39-2-211(a)]:

All other kinds of murder shall be deemed murder in the second degree.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals erroneously found that the state trial court's jury instructions on malice violated due process.

The Court of Appeals for the Sixth Circuit has misapplied the holding of this Court in *Sandstrom v. Montana,* 442 U.S. 510 (1979). Furthermore, this Court should take this opportunity to determine under what circumstances the overall jury charge precludes a finding that the challenged instructions create a burden-shifting presumption on a particular element of the offense. The decision of the Court of Appeals is directly in conflict with the subsequent decision of the Supreme Court of Tennessee in *State v. Bolin,* 678 S.W.2d 40 (Tenn. 1984), wherein the highest state court has determined that similar malice instructions do not violate the principles set forth by this Court in *Sandstrom.* It is probable that the Tennessee state courts will apply *Bolin* in similar cases and affirm the challenged convictions, while the federal courts, in adjudicating the constitutionality of the instructions on habeas corpus review, will adhere to the decision of the Court of Appeals in this case. Therefore, this Court should grant the writ of certiorari and review the issues presented here.

In *Sandstrom,* the defendant was charged with "deliberate homicide", defined in the Montana statute as a criminal homicide committed "purposely or knowingly." Sandstrom admitted the homicide at his trial, but insisted that he did not commit the crime "purposely or knowingly." He argued that the jury instruction, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts", had the effect of shifting the burden of proof to him on the issue of whether the defendant acted "purposely or knowingly." *Id.,* at 512-513.

The Court said that the threshold inquiry to determining the constitutionality of such an instruction was to determine the nature of the presumption it described, which determination requires:

> careful attention to the words actually spoken to the jury, see *id.*, [*Ulster County Court v. Allen*, 442 U.S. 140 (1979)] at 157-159, n. 16, 99 S.Ct., at 2225, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Id., at 514. In *Ulster*, the Court distinguished between the two types of evidentiary devices, the permissive inference and the mandatory presumption. The permissive inference allows, but does not require, the triers of fact to infer the elemental fact from proof by the state of the basic fact and places no burden of any kind on the defendant. The mandatory presumption tells the triers of fact that they must find the elemental fact upon proof of the basic fact unless the defendant comes forward with some evidence to rebut the presumed connection between the two facts. *County Court of Ulster County v. Allen*, 442 U.S. 140, 156-157 (1979).

In *Sandstrom*, this Court concluded that a reasonable jury could have interpreted the jury instruction "as a direction to find intent upon proof of the defendant's voluntary action (and their 'ordinary' consequences) unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence — thus effectively shifting the burden of persuasion on the element of intent." *Id.*, at 517. That conclusion was based upon the force of the words, "the law presumes", and the failure of the trial judge to instruct that the jury presumption could be rebutted.

Montana's Rules of Evidence expressly stated that the presumption at issue could be overcome only "by a preponderance of evidence contrary to the presumption." This Court concluded that both the burden of production and the ultimate burden of persuasion on the issue of intent were thus shifted to the defendant in violation of the due process principle that protects the accused against conviction except upon proof

beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant was charged.

The petitioner submits that the words of the presumption in this case, the immediate context in which they appear and the overall context of the jury instructions, distinguish this case from the due process violation in *Sandstrom*.

Sandstrom repeatedly emphasized the significance of the failure to tell the jury that the presumption could be rebutted. However, the words of the presumption in the instant case are more permissive than "the law presumes that a person intends the ordinary consequences of his voluntary acts." The instruction in the instant case immediately stated that the presumption may be "rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State." Thus, there was no suggestion that such evidence must have been established by the respondent or that he had any burden of proof with respect to such evidence.

Moreover, aside from the malice instructions under attack, the instant trial court instructed the jury that the defendant was presumed innocent; that it was encumbent upon the state to prove each element of the offense beyond a reasonable doubt; that the presumption of malice may be rebutted by either direct or circumstantial evidence, or by both regardless of whether the same be offered by the defendant or exists in the evidence of the state; that malice cannot be inferred from mere deadly intent; that the jury should look to all the facts and circumstances developed by the evidence to determine whether the state has proven beyond a reasonable doubt the existence of malice; and that if the jury had a reasonable doubt as to whether the killing was committed maliciously, then the defendant must be acquitted of murder. (Dist. Ct. Ex. 1, pp. 1078, 1086-1089).

This Court has consistently recognized that, "a single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *Cupp v. Naughten,* 414 U.S. 141, 146-147 (1973). The overall charge in this case precludes a legal finding that a reasonable jury could have interpreted the questioned language as a mandatory presumption shifting the burden of proof to the defendant on the element of malice.

With the challenged instructions not requiring the respondent to prove the absence of malice and not requiring the respondent to present any evidence to rebut the presumption of malice, the petitioner submits that the Court of Appeals clearly erred in determining that the jury instructions concerning the presumption of malice which arises upon the use of a deadly weapon is violative of the respondent's constitutional rights by requiring him to rebut the element of malice necessary to sustain a conviction for first or second degree murder and by relieving the prosecution of its burden to prove each element of the crime beyond a reasonable doubt.

2. The Court of Appeals erroneously found that error in the state trial court's jury instructions on malice was not harmless beyond a reasonable doubt.

Finding that malice was a disputed element of the crime in the instant case, the Court of Appeals for the Sixth Circuit held that a traditional harmless error analysis was precluded by *Connecticutt v. Johnson,* 460 U.S. 73 (1983). The petitioner submits that the Court of Appeals erred in finding that malice was a disputed element and further erred in declining to apply the appropriate harmless error standard.

In *Johnson,* this Court divided equally on the appropriateness of a harmless error analysis in cases where jury instructions were found to be violative of *Sandstrom v. Montana,* 442 U.S. 510 (1979). Four justices favored a traditional harmless error approach, while four others would find harmless

error only under rare circumstances, with the remaining justice arguing that the writ of certiorari was improvidently granted. Given that this Court has not supplied clear guidance on this question, the Court of Appeals determined that *Sandstrom* errors are subject to a harmless error analysis only under rare circumstances. *See Engle v. Koehler,* 707 F.2d 241, 246 (6th Cir. 1983); *See also Conway v. Anderson,* 698 F.2d 282, 284 (6th Cir. 1983).

In *Conway,* the Court of Appeals held that the prejudicial effect of a *Sandstrom* error is primarily a function of the defense asserted at trial. Thus, where a defendant acknowledges that an intentional and malicious killing occurred, but claims nonparticipation, this type of error may be harmless. Conversely, where a defendant asserts a lack of *mens rea,* the error is prejudicial even if the proof of malice is substantial. *Id.,* at 285; *Engle v. Koehler, supra,* 707 F.2d at 246.

Contrary to the finding of the Court of Appeals, the petitioner asserts that the instant case falls within the former category. Under Tennessee law, malice is an intent to do an injury to another, a design formed in the mind to do mischief to another. Express malice is actual malice against the party slain and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is not malice against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit, and a heart fatally bent on mischief regardless of social duty. *Fox v. State,* 1 Tenn. Crim. App. 308, 441 S.W.2d 491 (1968). Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed, but death resulted from a consciously unlawful act done intentionally and with knowledge on the wrongdoer's part that the act was directly perilous to human life. *State v. Johnson,* 541 S.W.2d 417 (Tenn. 1976).

Under the facts of the case at bar, the petitioner asserts that the respondent presented only two viable defenses at trial: lack

of participation and temporary insanity. As to the respondent's defense that he was not involved in the murders, the respondent basically acknowledged that the murders were committed in a malicious manner. As to the respondent's defense of insanity at the time of the commission of the murders, such a defense acknowledges the elements of the crimes but disavows criminal culpability for their commission. *See Graham v. State,* 547 S.W.2d 531, 543 (Tenn. 1977). The petitioner therefore submits that the element of malice was not placed in issue by these two defenses.

Although there was some evidence presented before the jury that the appellee might have been intoxicated at the time of the commission of the crimes,[1] the Court of Appeals misinterpreted Tennessee Law concerning voluntary intoxication. Contrary to the appellate court's interpretation, voluntary intoxication may negate only the element of premeditation and does not, as a matter of law, negate the element of malice.[2] *State v. Adkins,* 653 S.W.2d 708 (Tenn. 1983); *State v. Bullington,* 532 S.W.2d 556 (Tenn. 1976).

Therefore, regardless of the state of the respondent's sobriety at the time of the commission of the crimes, the existence of the element of malice was not placed in issue by the limited proof showing voluntary intoxication.

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[1] Evidence of the respondent's intoxication was admitted through the testimony of defense psychiatrist Dr. John Griffin, whose testimony did not constitute substantive proof of intoxication. Rather, the doctor's testimony concerned itself with what the respondent told him during a mental evaluation.

[2] The record reveals that the jury was correctly instructed concerning the matter of voluntary intoxication. (Dist. Ct. Ex. 1, pp. 1096-1097).

Likewise, the Court of Appeals misinterpreted Tennessee law concerning the respondent's claim of amnesia.[3] The appellate court labeled the respondent's purported "defense" of amnesia as a "mental illness." However, contrary to the appellate court's interpretation, amnesia is not a defense to crime under Tennessee law. *Burton v. State,* 217 Tenn. 62, 394 S.W.2d 873 (1965); *Lester v. State,* 212 Tenn. 338, 370 S.W.2d 405 (1963); *Thomas v. State,* 201 Tenn. 645, 301 S.W.2d 358 (1957). The element of malice could therefore not have been placed in issue, as a matter of law, by the respondent's purported amnesia at the time of the commission of the crimes.

The petitioner further asserts that with the proof overwhelmingly establishing the element of malice, the Court of Appeals finding to the contrary is clearly erroneous. The proof shows that on the night of December 30, 1978, the respondent pursued the victims in his truck prior to ambushing them when they pulled into a driveway to let him pass their vehicle. (Dist. Ct. Ex. 1, pp. 65-67, 93-94, 204-205). With the victims' vehicle being blocked by the respondent's truck and another vehicle, the victims were unable to escape and offered no resistance as the respondent shot Charles Browning once in the head and shot Joy Faulk three times (two shots to the head and one shot to the back of her left shoulder). (Dist. Ct. Ex. 1, pp. 167, 175, 185, 201-202, 573, 578, 580). In order to insure that he killed the victims, the respondent placed his .25 caliber automatic pistol inside the cab of the victims' vehicle and then shot Browning from a distance of six to eight inches and shot Faulk from a distance

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[3] Again, evidence of the respondent's alleged amnesial was not admitted as substantive proof to establish that the respondent actually suffered from amnesia, but rather was admitted to establish what the respondent related to the defense psychiatrists. (Dist. Ct. Ex. 1, pp. 800, 841, 881). Interestingly, the respondent himself disagreed with the defense psychiatrists' diagnosis of amnesia, indicating to the state psychiatrist that he "knew where he was and what he had been doing" at the time the crimes were committed. (Dist. Ct. Ex. 1, pp. 935).

of no more than eighteen inches. (Dist. Ct. Ex. 1, pp. 107, 138, 227).

Other proof established that the respondent, who was Joy Faulk's former boyfriend, did not want Faulk to date other men even though they had stopped dating one month prior to the commission of the murders. (Dist. Ct. Ex. 1, p. 401). During the Fall of 1978, and particularly during November and December, the respondent on six different occasions threatened to kill Faulk if he ever caught her with another man. (Dist. Ct. Ex. 1, pp. 392, 395, 397, 462, 471, 508).

Still more proof establishing the element of malice showed that the respondent, who believed that Joy Faulk was dating other men (particularly Charles Browning) visited Browning's wife on December 25, 1978 in order to determine the nature of the Faulk-Browning relationship. At that time, the respondent made it clear that he was going to act upon his prior death threats, telling Mrs. Browning that "Well, I just wanted to find out what is going on before I got mad and flew off the handle and did what I had to do." (Dist. Ct. Ex. 1, pp. 412, 472-474). At the time he made this veiled threat, the respondent was in possession of the murder weapon. (Dist. Ct. Ex. 1, p. 507).

Finally, the evidence shows that the respondent intentionally and deceptively obtained the murder weapon well before the commission of the murders on December 30, 1978. In this regard, the proof shows that on the Saturday prior to Christmas Day, the respondent borrowed the murder weapon from a friend by concocting a bogus story to the effect that his (the respondent's) gun had been stolen. (Dist. Ct. Ex. 1, pp. 558, 602). With the proof showing that the respondent's gun had actually not been stolen, (Dist. Ct. Ex. 1, pp. 507, 511-512, 533-535), it is clear that the respondent obtained the murder weapon in advance for the sole purpose of committing murder.

Under the facts presented by this record, the petitioner submits that any error in the jury instruction on malice was harmless beyond a reasonable doubt. The Court of Appeals' finding to the contrary is therefore clearly erroneous.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-5744

STANLEY BARHAM CLARK,
Petitioner-Appellee,

vs.

JIMMY C. ROSE, WARDEN,
Respondent-Appellant.

On Appeal From The United States District Court
For The Middle District Of Tennessee

Decided and Filed April 1, 1985

BEFORE: KENNEDY and WELLFORD, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

PER CURIAM. Stanley Barham Clark, petitioner, was convicted in Tennessee state court of one count of first degree murder and one count of second degree murder. He was sentenced to live imprisonment in the state penitentiary for terms of life and ten years, respectively. Following his conviction, petitioner appealed to the Tennessee Court of Criminal Appeals. That court affirmed his conviction, and subsequently the Tennessee Supreme Court denied petitioner permission to appeal. Petitioner has instituted the present action, claiming that the trial court violated his fourteenth amendment right to due process by shifting to him the burden of disproving an element of his asserted offense under *Sandstrom v. Montana,* 442 U.S. 510 (1979). The district court agreed with petitioner and granted the writ of habeas corpus requested. The State of Tennessee now appeals.

In December of 1978, Charles Browning and Joy Faulk were shot to death while sitting in the cab of Browning's pickup truck

in a rural area of Rutherford County, Tennessee. Faulk and Browning had a relationship which angered petitioner, Faulk's former lover. The night of the murders a police officer observed a brownish colored pickup truck belonging to Clark pursuing Browning's truck in the general vicinity of the homicides.

The murder weapon, a .25 caliber pistol, was identified as belonging to petitioner's friend, Terry Hill. Petitioner had borrowed the handgun from Hill a few days before the shooting and had informed Hill that the gun had been stolen; it was found following the murders on a roadside near Clark's home.

Faulk's two young children, ages six and three, were with Faulk and Browning in the truck the night of the shooting, and were found afterward wandering along a rural road seeking help. The older child testified at trial that "Clicker" (a nickname for petitioner) had followed them the night of the shooting and then had shot her mother and Browning. Her testimony was corroborated by what she had told others the night of the incident. The police located petitioner in his truck near the driveway to his home after the shootings. Clark fled from the police and forced a high speed chase before the officers were able to apprehend him.

At trial, consistent with the Tennessee Pattern Jury Instructions, the court charged the jury on the issue of malice, a requisite element of both first and second degree murders:[1]

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption.

---

[1] First degree murder requires proof of a "willful, deliberate, malicious and premeditated killing." Tenn. Code Ann. § 39-2-202. Second degree murder requires a willful killing, done with either expressed or implied malice aforethought. *Gordon v. State*, 478 S.W.2d 911 (Tenn. 1971). "Expressed malice" is actually contemplating the injury to the party slain, while "implied malice" is the more general wicked, depraved and malignant state of mind. *See Fox v. State*, 1 Tenn. Crim. App. 308, 441 S.W.2d 491 (1968).

> Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously, but this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances. A 'deadly weapon' is any weapon or instrument which from the manner in which it is used or attempted to be used is likely to produce death or cause great bodily injury.

Although petitioner failed to object to these trial instructions, he challenged their constitutionality in the Tennessee Court of Appeals. The Tennessee appellate court, rather than relying on this procedural default, rejected petitioner's constitutional challenge on its merits. The petitioner exhausted his state remedy, and the district court properly assumed jurisdiction of the habeas corpus action under 28 U.S.C. § 2554.

We are called upon, then, to decide (1) whether the jury instructions impermissibly shifted the burden of proof to the defendant, and (2) whether the error, if any, was harmless.

This court has previously considered similar issues and has concluded that such presumption-of-malice instructions violate the fourteenth amendment's due process clause, following *Sandstrom; see Phillips v. Rose,* 690 F.2d 79 (6th Cir. 1982); *Conway v. Anderson,* 698 F.2d 292 (6th Cir.), *cert. denied,* 103 S.Ct. 3092 (1983); and *Engle v. Koehler,* 707 F.2d 241 (6th Cir.), *cert. granted,* 104 S.Ct. 231 (1983), *aff'd by equally divided Court,* 104 S.Ct. 1673 (1984). That instruction given in *Phillips,* a Tennessee case, was:

> If a deadly weapon of any kind or character is handled in a manner so as to make the killing a natural or probable result, malice will be presumed from the use of the weapon.

690 F.2d at 80. A part of the instructions given in the present case is similar to those given in *Phillips*.

Appellee argues that the error, if any, was cured by another jury instruction in this case which directed the jury to consider all the evidence in reaching a verdict. We find this argument unpersuasive. We find the instructions in question here to run afoul of *Sandstrom*, and that *Phillips* is also persuasive, because the intent of petitioner, and other defenses raised by him relating to his mental capacity at the time, were very much at issue.

In *Connecticut v. Johnson*, 460 U.S. 73, 74 n.1 (1983), Justice Blackmun characterized three possible positions that may be taken in considering implications of *Sandstrom:*

> (1) *Sandstrom* errors may be harmless where "the evidence of guilt was overwhelming";
>
> (2) *Sandstrom* errors may be harmless where the affected element of the crime is not a disputed element in the case;
>
> (3) *Sandstrom* errors may never be considered harmless.

Justice Blackmun noted that authority existed for all three views.

In *Johnson*, speaking through Justice Powell, four Justices, taking a different position than did Justice Blackmun, applied a traditional harmless error analysis established in *Chapman v. California*, 386 U.S. 18 (1967).[2] Under this analysis, error may

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[2] Justice Stevens in *Johnson* sided with neither Justice Blackmun nor Justice Powell. Rather, he was of the view that harmless error is not a matter of constitutional dimension, and thus where not applied

be disregarded where the beneficiary of the error "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24.

In *Engle v. Koehler,* 707 F.2d at 246, we observed:

> The prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial. If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of *mens rea,* a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial.

The Court held that because the defendant in that case admitted the killing, "but denied having the requisite *mens rea* to sustain a murder conviction because of the combined effects of intoxication, the librium pills and mental disease," the trial court's instructions in regard to malice and intent could not be considered harmless.

Thus both *Phillips* and *Koehler* would seem to indicate that the *Sandstrom* error is not harmless where, as here, defendant claims, among other defenses: (1) because of mental illness and intoxication he was not guilty; and (2) temporary insanity. Clark therefore asserted clearly "lack of *mens rea,*" and it cannot be denied that the placing of the burden on defendant to show that he lacked the requisite intent required under the first degree murder charge could be prejudicial. *Compare Conway v. Anderson,* 698 F.2d at 285, where retroactive application of *Sandstrom* was recognized and it was held that "the corrupting effect of a *Sandstrom* instruction is to a great extent a function

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by the state appellate court, would not warrant certiorari action by the Supreme Court. He would have dismissed the writ, thus, in effect, affirming the state court, and joined the four justice plurality as to the result reached.

of the defense...imposed at trial." The court there also found that where *mens rea* is "integral to the criminal offense...a *Sandstrom* instruction...possesses the capability of being extremely prejudicial." *Id.*

Accordingly, we agree with the trial court in this case that there was a *Sandstrom* violation inherent in the instructions given by the Tennessee trial court, and that in this murder case involving a defense of lack of *mens rea,* the error was not harmless beyond a reasonable doubt, despite the substantial evidence of petitioner's guilt presented to the jury.

Were we writing on a clean slate, we would direct our inquiry to that suggested by Justice Powell (dissenting) in *Connecticut v. Johnson,* 460 U.S. at 97 n.5:

> the inquiry is whether the evidence is so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.

If that were the question in this case, apart from prior precedent established in the cases cited from our circuit (*Phillips, Koehler,* and *Conway*), we might be able to respond in the affirmative.

For the reasons stated, however, we must AFFIRM the district court and direct the issuance of the writ of habeas corpus unless the State of Tennessee elects to re-try petitioner within ninety (90) days from the issuance of this Per Curiam.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Civil action no. 3:83-0766

Stanley Barham Clark,
Petitioner,

v.

Jimmy C. Rose, etc.,
Respondent.

MEMORANDUM OPINION AND ORDER

This is an application by a state-prisoner for the federal writ of habeas corpus. 28 U.S.C. § 2254(a). The petitioner Mr. Stanley Barham Clark was convicted on July 20, 1979 in the Circuit Court of Rutherford County, Tennessee of murder in the first and second degrees.[1] *Inter alia,*[2] Mr. Clark contends that certain instructions given the jury shifted effectively the burden of proving malice, an essential element of the crimes charged, from the prosecution to him, in violation of his right to due process of law, Constitution, Fourteenth Amendment. *See Sand-*

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[1] The petitioner was sentenced to life imprisonment on the first degree murder conviction and to 10-years' imprisonment on the second degree murder conviction. Both such convictions were affirmed on direct appeal by the Court of Criminal Appeals of Tennessee, and the petitioner's application for permission to appeal to the Supreme Court of Tennessee was denied.

[2] Mr. Clark asserts some 8 grounds in support of his petition. Each of those grounds was presented to the state appellate courts, and therefore, as the respondent concedes, the applicant has exhausted his available state remedies. *See Rose v. Lundy,* 455 U.S. 509, ____, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982); *Bowen v. State of Tennessee,* 698 F.2d 241, 243-244 [2] (6th Cir. 1983) (en banc).

strom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979).[3] Under the law of this Circuit, such contention has merit.

I.

On the cold, rainy night of December 30, 1978, Mr. Charles Browning and his companion Ms. Joy Faulk were shot to death at near point-blank range while they sat in the cab of Mr. Browning's pickup truck in a rural area of Rutherford County, Tennessee. Ms. Faulk's two young daughters Mitzi and Michelle, ages 6 and 3, respectively, were with their mother at the time of the shooting and were found afterward wandering along a roadway in search of assistance. The petitioner, a former live-in boyfriend of Ms. Faulk who had threatened to kill her if he ever caught her with another man, was charged with two counts of murder in the first degree. His trial began on July 16, 1979 and was presided over by the Honorable William S. Russell.[4]

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[3] *Sandstrom* was decided less than a month before the commencement of Mr. Clark's trial.

[4] After a decade of service on the Court of Criminal Appeals of Tennessee, Judge Russell retired as a presiding judge thereof in 1979. Previously, he had served as a judge of the 23rd Judicial Circuit of Tennessee, which court exercised trial-jurisdiction of civil and criminal actions. From 1976-1981, Judge Russell chaired a special committee appointed by the Supreme Court of Tennessee to study and promulgate what ultimately were adopted as the Tennessee Rules of Cirminal Procedure. Following his "retirement", Judge Russell has sat periodically as a judge in the trial- and intermediate-appellate-courts of Tennessee, and as a special justice on the Supreme Court of Tennessee.

The Court of Criminal Appeals of Tennessee characterized the case against Mr. Clark as substantially circumstantial[5] and involving " * * * a somewhat complicated domestic situation. * * * " *State of Tennessee,* appellee, v. *Stanley Barham Clark,* appellant, unpublished opinion of February 27, 1981 in no. 79-106-II. Such appellate Court summarized the evidence thusly:

> * * * The former husband of Joy Faulk, one of the victims, is the stepbrother of Shirley Browning the wife of the other victim. Joy Faulk and Charles Browning were involved in a relationship which had considerably agitated defendant. Prior to taking up with Browning, Joy Faulk and Clark had lived together. Their cohabitation was apparently a stormy one. After they separated he became very upset because she was dating other men, including Browning. This homicide occurred on the night of December 30, 1978. Shortly after 9:00 on that night, a police officer observed a brown, or brownish colored pickup truck pursuing a red pickup truck in the general vicinity of the homicide scene. The brown truck was subsequently identified as the property of defendant. The red truck was owned by Charles Browning. An hour or two later the bodies of Browning and Joy Faulk were discovered in the truck which was parked in the driveway of Mrs. Faulk's former brother-in-law. Mitzi Faulk, six-year-old daughter of Joy Faulk, and her three-year-old sister, were passengers in Browning's truck at the time of the homicide. She told witnesses, and testified, that defendant, who was known as "Clicker" had followed them into the driveway of Jeff Faulk and shot her mother and

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[5] Mitzi Faulk, an eyewitness to the shootings, identified Mr. Clark positively as the killer. Although her testimony was discredited on cross-examination, she was rehabilitated through the testimony of other witnesses.

> Charles Browning. The murder weapon, a .25 caliber pistol, had been borrowed by defendant from a friend, Terry Hill, a few days before the shooting occurred. He told Hill the pistol had been stolen. Sometime later, it was found by the roadside near defendant's home. While police officers were searching for him on the night of the homicide, they encountered him in his pickup truck near the driveway to his home. He fled, resulting in a high speed chase for some distance before he was apprehended.
>
> * * * * * *

Ib., at 1-2.

II.

The trial-judge instructed the jury[6] that in order to find the petitioner guilty of murder in the first degree, the State must have proven beyond a reasonable doubt *inter alia:*

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[6] It does not appear that defense counsel objected at trial to any of the challenged jury instructions in accordance with Tennessee's contemporaneous-objection rule. *See* Rule 30(b), Tenn.R.Crim.P.; *Pulley v. State,* 506 S.W.2d 164, 167 [2,3] (Tenn.Crim.App. 1973), *cert.den.* by Supreme Court of Tennessee (1974) (error in jury instructions cannot be raised for the first time on appeal). The respondent does not argue, however, that the bar of *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), should be applied so as to preclude consideration of this claim on its merits.

It is clear that *Wainwright v. Sykes, supra,* does not preclude this Court from reaching the merits of the instant claim because the Court of Criminal Appeals of Tennessee did not rely on the failure of Mr. Clark to make a contemporaneous-objection but reached the merits of this claim, holding that the challenged instructions did not violate *SAndstrom, supra,* at 13-15. " * * * Where a state appellate court does not rely on a procedural default, but reaches the merits of the federal law claim, the *Sykes* bar is inapplicable. * * * " *Melchior v. Jago,* 723 F.2d 486, 490 [4] (6th Cir. 1983), *cert.den.* ____ U.S. ____, 104 S.Ct. 2156, ____ L.Ed.2d ____ (1984).

> * * * That the killing was malicious: That is, that the Defendant was of the state of mind to do the alleged wrongful act without legal jurisdiction or excuse. *If it is shown beyond a reasonable doubt that the alleged victims were killed, the killing is presumed to be malicious in the absence of evience which would rebut the implied presumption.* [Emphases provided here.] * * *
>
> * * * * * * *

Transcript, pp. 1084-1085. As to the lesser-included offense of murder in the second degree, the jury was instructed that the State must have proven beyond a reasonable doubt *inter alia* that the killing "was malicious" and that malice "is an essential ingredient" of second degree murder. *Ib.*, at 1086. Additionally, the trial judge charged:

> * * * * * *
>
> *All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously.* But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.
>
> *Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree* unless it is rebutted by other facts and circumstances. * * *
>
> * * * * * *

> The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all the facts and circumstances developed by the evidence to determine whether the State has proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the alleged killing was done with malice, then the Defendant cannot be guilty of murder in the second degree and you must acquit him of that offense.
>
> * * * * * * *

Ib., at 1087-1089 (emphases provided here).

There is absolutely no doubt that the trial judge instructed the jury in accordance with the settled law of Tennessee;[7] in fact,

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[7] It has long been the rule in Tennessee that all homicides are presumed to be malicious. *See Everett v. STate,* 528 S.W.2d 25, 26 [2] (Tenn. 1975) ("All homicides are presumed to be malicious in t absence of evidence which would rebut the implied presumption."); *Sikes v. STate,* 524 S.W.2d 483, 485 [2] (Tenn. 1975)(same); *Gann v. State,* 214 Tenn. 711, 383 S.W.2d 32, 36 [11] (1964) (same); *Lewis v. State,* 202 Tenn. 328, 304 S.W.2d 322, 324 [1] (1957) (where a homicide is clearly proven and the slayer ascertained, and nothing else is shown, the killing is presumed to have been done maliciously); *Mitchell v. State,* 13 Tenn. (5 Yerg.) 340, 349-350 (1833) ("[if] the killing be proved, the law presumes that it was malicious, and [] it was incumbent on the defendant to show, by proof, matters in alleviation, or that it was a less offence"); *Coffee v. State,* 11 Tenn. (3 Yerg.) 283, 291 (1832) ("if A kill B, and that fact alone being established by the State, the malice is presumed, and the *onus* of exculpation is upon the defendant").

Additionally, the law of Tennessee presumes malice form the use of a deadly weapon. *Everett v. State, supra,* 528 S.W.2d at 26 [2]; *Sikes v. State, supra,* 524 S.W.2d at 485 [3]; *Gann v. STate, supra,* 383 S.W.2d 36 [12]; *Smith v. State,* 212 Tenn. 510, 370 S.W.2d 543, 545 [4] (1963); *Nance v. STate,* 210 Tenn. 328, 358 S.W.2d 327, 329 [4] (1962). These prsumptions of malice appear to be an outgrowth of the (now) unconstitutional presumption that every person intends the usual and natural consequences of his or her acts. In *Draper v. STate,*

his instructions were identical to those contained in the Tennessee Pattern Instructions.[1] However, some three years after the trial under consideration was completed, the Court of Appeals for this Circuit held that such "presumption-of-malice" instructions were infirm constitutionally under *Sandstrom*,

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63 Tenn. 246, 247 (1875), the Supreme Court of Tennessee approved the jury instruction that

> * * * "every man is presumed to be innocent, until his guilt is legally made to appear; but when a homicide is clearly proven, and the slayer ascertained, and nothing more appears, the killing is presumed to be criminal, as every person is presumed to intend the usual and natural consequences of his acts."

The highest Court of Tennessee does not appear to have considered the validity of the foregoing presumptions subsequent to the decision of the Supreme Court of the United States in *Sandstrom*. Interestingly, however, the Supreme Court of Tennessee stated recently that "* * * [m]alice may be *inferred* [emphasis provided] from the use of [a deadly weapon]. * * *" *State v. Caldwell*, ____ S.W.2d ____, ____ (Tenn. 1984) (decided April 30, 1984). There is, of course, a big difference between an instruction which permits malice to be *inferred*, and one which says it will be *presumed*.

"* * * While presumptions of an element [of a crime] are clearly unconstitutional, premissive inferences do not run afoul of the Constitution. * * *" *Carter v. Jago*, 637 F.2d 449, 455-456 [4] (6th Cir. 1980), *cert.den.* 456 U.kS. 980, 102 S.Ct. 2249, 72 L.Ed.2d 856 (1982), citing *Sandstrom, supra*, (upholding instruction that the jury "may infer" malice where one intentionally shoots another with a weapon in a manner calculated to cause death). *Cf. Harless v. Anderson*, 664 F.2d 610 (6th Cir. 1981), *rev'd. on other grounds*, 459 U.S. 4, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982)(instruction requiring jury to find malice if death caused by use of gun is unconstitutional). "* * * This distinction between a permissible inference and a mandatory or burden-shifting presumption is critical. * * *" *Krzeminski v. Perini*, 614 F.2d 121, 125, n. 4 (6th Cir. 1980), *cert.den.* 449 U.S. 866, 101 S.Ct. 199, 66 L.Ed.2d 84 (1980).

[1] *See* 7 West's Tennessee Practice, Tennessee Pattern Jury Instructions: Criminal, §§20.01, 20.04.

supra,[9] because they " • • • clearly had the effect of shifting the burden of persuasion regarding malice, an element of both first and second degree murder in Tennessee, to the defendant. • • •"*Phillips v. Rose,* 690 F.2d 79, 81 (6th Cir. 1982); *accord: Lockett v. Arn,* 728 F.2d 266, 272 (6th Cir. 1984) (*mens rea* element of crime cannot be presumed from defendant's acts; such a presumption forces defendant to assume burden of disproving an essential element of the crime); *Engle v. Koehler,* 707 F.2d 241 (6th Cir. 1983), *aff'd. by equally-divided Court* ____ U.S. ____, 104 S.Ct. 1673, 80 L.Ed.2d 1 (1984); *Krzeminski v. Perini, supra,* 614 F.2d at 123-124 [1] ("What the state may not do is presume that an element of a crime exists as a result of given conduct and then place the burden of showing otherwise on the defendant.")

The respondent argues there was no *Sandstrom* deficiency here because the trial-judge instructed the jury also that the burden was on the State to prove the existenc eof malice beyond a reasonable doubt and that the jury should consider all the facts and circumstances in determining whether the State had met such burden. This very argument was rejected in *Phillips v. Rose, supra,* because these additional instructions are not inconsistent rhetorically with the existence of a burden-shifting presumption, since a reasonable juror could have regarded the presumption of malice as a means by which proof of malice beyond a reasonable doubt could be satisfied. *Id.,* 690 F.2d at 81; *accord: Engle v. Koehler, supra,* 707 F.2d at 245.

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[9] Of course, *Sandstrom* is applied retroactively in this Circuit. *Engle v. Koehler, supra,* 707 F.2d at 244, n. 1; *Burton v. Bergman,* 649 F.2d 428, 431, n. 3 (6th Cir. 1981), *vac't'd. on other grounds* ____ U.S. ____, 102 S.Ct. 2026, 72 L.Ed.2d 477 (1982). The Court of Criminal Appeals of Tennessee has also applied *Sandstrom* retroactively because it "• • • did nsot elucidate some new principle of constitutional law, but reiterated a rule that was conclusively stated as long ago as 1952. • • •" *State v. Chavis,* 617 S.W.2d 903, 908 (Tenn.Crim.App. 1980), *permis.app.den.* (Tenn. 1981), citing *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed.2d 288 (1952).

Under the instructions given by the trial-judge, the jury could have understood reasonably that the prosecution could meet its burden of proving the element of malice merely by showing that a killing had occurred; that once the State demonstrated a killing, malice was presumed, and it then devolved upon Mr. Clark to negate the existence of such element. "* * * Such an instruction effectively shifts the burden to the defendant of disproving an element of the crime. This is constitutionally forbidden. * * *" *Krzeminski v. Perini, supra,* 614 F.2d at 124-125; *accord: Lockett v. Arn, supra,* 728 F.2d at 272 ("Such a presumption forces the defendant to assume the burden of disproving an essential element of the crime.")

III.

The remaining consideration, then, is whether the giving of the foregoing jury-instructions constituted harmless error. "* * * [H]armless error in the context of an asserted constitutional violation is an extremely narrow standard, premitting the state to avoid retrial only if it can be demonstrated beyond a reasonable doubt that the error did not contribute in any way to the conviction. * * *" *Melchior v. Jago, supra,* 723 F.2d at 493 [14].

In this Circuit,

> * * * the prejudicial effect of a *Sandstrom* instruction is largely a function of the defense asserted at trial. If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of *mens rea,* a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial. * * *

Engle v. Koehler, supra, 707 F.2d at 246; *accord: Lockett v. Arn, supra,* 728 F.2d at 273; *Conway v. Anderson,* 698 F.2d 282, 285 (6th Cir. 1983), *cert.den.* ____ U.S. ____, 103 S.Ct.

3092, 77 L.Ed.2d 1352 (1983); *see Connecticut v. Johnson*, ____ U.S. ____, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983)(plurality opinion);[10] *cf. Steele v. Taylor*, 684 F.2d 1193, 1205, n. 14 (6th cir. 1982), *cert. den.* ____ U.S. ____, 103 S.Ct. 1501, 75 L.Ed.2d 932 (1983) ("Constitutionally defective instructions impose an improper framework for the evaluation of all evidence and can virtually never be harmless.")

Clearly, this is not a situation where the defendant acknowledged at trial that an intentional, malicious killing had occurred and only claimed non-participation therein. Instead, Mr. Clark's defense accented both the physical and mental elements of the offenses charged. His defense was threefold: (1) that he did not commit the killings and knew nothing about them;[11] (2) that, because of mental-illness and voluntary intoxication, he was not guilty; and (3) that, even if the jury should

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[10] The federal Supreme Court has not given clear guidance on the standard of harmless error which should be applied to a *Sandstrom*-deficient jury instruction. In *Connecticut v. Jonson, supra*, a plurality of four justices followed essentially the standard applied in this Circuit — that such an instruction could constitute harmless error only in rare cases, such as where the defendant conceded the *mens rea* elements of the offense; four other justices favored a traditional harmless-error approach. Until further guidance is provided by the Supreme Court of the United States, this Circuit continues to follow the standard it has used in the past. *Engle v. Koehler, supra.*

[11] In the words of the Court of Criminal Appeals of Tennessee: "Defense counsel exerted a diligent effort to show, among other theories, that animosity existed toward Joy Faulk on the part of Sam Faulk, her ex-husband, and that Shirley Browning, wife of Charles Browning also had the motive and the incentive to commit the homicide[s].***" Opinion, *supra*, at 2.

find the existence of all elements of the crimes, he should be found not guilty by reason of insanity.[12]

From the outset of the trial, it was clear that the defense was unlikely to concede anything, rather that it intended to put the State to its burden of proving beyond a reasonable doubt every element of the offenses charged, physical as well as mental. The reliance on a *mens rea* defense, in addition to the claim of non-participation, was evident throughout the entire trial:

(1) In his opening statement, counsel for Mr. Clark told the jury:

* * * * * *

> We will further show you that even if, as unlikely as it might be, the Prosecutor were able to establish to your satisfaction that Stanley Clark did commit the acts alleged, we will show you by psychiatric experts that Stanley Clark has no recollection of participating in any act as is charged against him and that, even if the State should submit evidence to establish that the acts were committed, then the evidence will show that Stanley Clark has total amnesia of any knowledge of the deaths of Joy Faulk or Charles Browning and that due to his mental condition he could not have possessed the mental capacity required to establish his guilt.

* * * * * *

Transcript, at 24.

(2) In his cross-examination of the witness Ms. Sylvia Kay Barrett, counsel for Mr. Clark brought out evidence that, for some months prior to the homicides, the petitioner had engaged

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[12] Under the law of Tennessee, the insanity defense is considered by the jury only if it has first found that the State has proven beyond a reasonable doubt each element of the offense charged. *See Graham v. State*, 547 S.W.2d 532, 543 (Tenn. 1977), citing the suggested jury-charge in *United States v. Brawner*, 471 F.2d 969, 1008 (D.C. Cir. 1972); Tennessee Pattern Jury Instructions: Criminal, § 36.06.

in strange behavior; had acted as if he really didn't know what he was doing; lost some 35 pounds in weight; could not eat or sleep; was bothered by his reminences of his experiences in Viet Nam; could see in his dreams Vietnamese people coming at him; was greatly depressed; acted as if he were a different person; grew progressively more quiet; was very withdrawn; and was upset physically and depressed emotionally. *Ib.* at 521-525.

(3) The trial judge himself recognized (after the State had rested its case-in-chief) the nature of the evolving defense: "***The principal issue here, as the Court discerns it after three and one-half days of trial, is who killed these people, or if this Defendant did it what was his state of mind?" *Ib.*, at 763.

(4) Immediately prior to the presentation of evidence for the defense, the trial judge inquired of counsel whether he should charge the jury on all four degrees of homicide. *Ib.*, at 774. Counsel for Mr. Clark requested him to do so, and stated "***that the appropriate charge is that if you find the Defendant killed while suffering from a mental disease or defect so great as to render him unable to formulate a specific intent to kill or to harbor malice, but not so great as to render him insane, his killing is involuntary manslaughter." *Id.*

(5) The trial judge recognized also at this point in the trial that there had been "***some rather tangential indication that there might be a drunkenness factor in the defense and, of course, there is a charge that reduces what would otherwise be first degree murder to no more than second degree murder in the event of an effect [of intoxication].***" *Ib.*, at 776. Defense counsel requested that such a jury instruction be given. *Id.*

(6) As its first witness, the defense called Dr. John Griffin, a psychiatrist, who testified that, in his professional opinion, Mr. Clark was suffering from a longstanding condition of depression at the time of the homicides and "***that his mental illness was such that it rendered him substantially incapable of conforming his behavior to the requirements of the law.***" *Ib.*, at

799-800. The testimony of Dr. Griffin supported also the petitioner's claim of amnesia, *ib.*, at 800, and that of voluntary intoxication, *ib.*, at 814-815. (Mr. Clark had told Dr. Griffin that, on the day of the homicides, he had consumed as much as 6 six-packs of beer plus a quantity of Vodka).

(7) Mr. Clark called as his second witness Dr. Roger White, also a psychiatrist. Dr. White testified that, in his professional opinion, Mr. Clark was suffering at the time of the homicides from "•••a serious and rather longstanding depressive neurosis •••" as a result of which "•••he was not able to conform his behavior to the requirements of the law at that time •••." *Ib.*, at 859-860. Dr. White's testimony supported further the petitioner's claim of amnesia. *Ib.*, at 860-862.

This Court's review of the trial record reflects that Mr. Clark asserted a *mens rea* defense which encompassed the essential element of malice. The trial judge instructed the jury that

> •••[a] case of homicide cannot be murder unless at and before the killing the wicked intent, constituting malice aforethought, exits in the mind of the slayer. Malice is an intent to do any injury to another, a design formed in the mind of doing mischief to another.
>
> *Ib.*, at 1086-1087.

The psychiatric- and other -evidence which the defense offered bore on the petitioner's state-of-mind at the time of the slayings. This evidence was [illegible]arly relevant on the issue of malice, for, unless Mr. Clark's state-of-mind was such that it harbored "wicked intent", or intent or design to injure or do mischief to another, he did not act with malice and could not have been guilty of murder: As the trial judge told the jury, the element of malice turned on the petitioner's state-of-mind, and, specifically, whether he "•••was of the state of mind to do the alleged wrongful act without justification or legal excuse." *Ib.*, at 1084.

Additionally, the evidence of voluntary intoxication[13] related to the issue of malice, for, under the law of Tennessee, intoxication "***may negate a finding of specific intent. Thus, when the inquiry is whether or not the accused is guilty of first degree murder, it becomes relevant to know whether or not the accused was in a state of intoxication and, if so, the extent of its effect upon his mental state.***" *State v. Bullington,* 532 S.W.2d 556, 560 (Tenn. 1976).

"***[E]ven when an intoxicated defendant is capable of forming specific intent, his drunkenness may be considered in determining whether he specifically intended the particular act for which he is on trial.***" *State v. Adkins,* 653 S.W.2d 708, 713 [3] (Tenn. 1983). Mr. Clark's alleged amnesia was relevant in so far as it reflected upon his state-of-mind at the time these offenses were committed. See *Lester v. State,* 212 Tenn. 338, 370 S.W.2d 405, 409 (1963); *Sparkman v. State,* 469 S.W.2d 692, 696-697 (Tenn. Crim. App. 1970), *cert. den.* (Tenn. 1970).

This is not a situation wherein the defendant admitted the *mens rea* elements of the offenses and relied solely on the defense of insanity, thereby sufficiently reducing the likelihood that the jury applied the erroneous *Sandstrom* instruction, *cf. Connecticut v. Johnson, supra,* ____ U.S. at ____, 103 S.Ct. at 978; to the contrary, Mr. Clark relied upon a *mens rea* defense and offered evidence on his mental-condition which bore on that defense as well as on his claim of insanity. Under these circumstances, the Court does not conclude that the challenged jury instructions contributed in no way to the petitioner's convictions for murder.

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[13] Although the evidence of voluntary intoxication was rather weak, it was sufficient to submit to the jury, as the trial judge did in his instructions. Transcript, at 1096-1097.

IV.

The petitioner, thus, is entitled to relief. The writ of habeas corpus will issue, directing the respondent-warden or his successor(s) to release the petitioner Mr. Stanley Barham Clark from custody under the aforementioned convictions forthwith unless the state of Tennessee has begun a retrial of him within 90 days herefrom.[14] *Peyton v. Rowe,* 391 U.S. 54, 66-67, 88 S.Ct. 1549, 1556 [8], 20 L.Ed.2d 426 (1968); *Irvin v. Dowd,* 366 U.S. 717, 728-729, 81 S.Ct. 1639, 1646 [13, 14], 6 L.Ed.2d 751 (1961).

ENTER: /s/ C. G. Neese
United States Senior Judge
District Judge by designation and
assignment

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[14] The Court does not consider redundantly any of the other grounds urged by Mr. Clark in his petition.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Civil action no. 3:83-0766

STANLEY BARHAM CLARK,
Petitioner,

vs.

JIMMY C. ROSE, etc.,
Respondent.

ORDER

For the reasons assigned in the accompanying memorandum opinion and order of this date, the writ of habeas corpus hereby is

GRANTED, and the respondent-warden, or his successor(s) in office, hereby is

ORDERED to release the petitioner Mr. Stanley Barham Clark from custody under his convictions of July 20, 1979 in the Circuit Court of Rutherford County, Tennessee forthwith unless the state of Tennessee has begun a retrial of him within 90 days herefrom.

ENTER: /s/ C. G. Neese
United States Senior Judge
District Judge by designation
and assignment

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
NASHVILLE, SEPTEMBER SESSION, 1980

No. 79-106

RUTHERFORD COUNTY

Hon. William S. Russell, Judge

(Murder)

State of Tennessee,
Appellee,

v.

Stanley Barham Clark,
Appellant,

FOR APPELLEE:

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Guy M. Dotson
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FOR APPELLANT:

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AFFIRMED

OPINION FILED: Feb. 27, 1981

CHARLES H. O'BRIEN, JUDGE

OPINION

Defendant appeals from his convictions for First and Second Degree murder in the Criminal Court for Rutherford County.

Numerous issues are raised, each of which he insists is grounds for reversal of his conviction.

Initially, it is contended that the evidence is insufficient to support the verdict because it fails to establish his guilt beyond a reasonable doubt.

This was substantially a circumstantial evidence case. It is defendant's contention that the evidence showed several other people had the opportunity and the motivation to kill the two (2) victims. This case involved a somewhat complicated domestic situation. The former husband of Joy Faulk, one of the victims, is the stepbrother of Shirley Browning the wife of the other victim. Joy Faulk and Charles Browning were involved in a relationship which had considerably agitated defendant. Prior to taking up with Browning, Joy Faulk and Clark had lived together. Their cohabitation was apparently a stormy one. After they separated he became very upset because she was dating other men, including Browning. This homicide occurred on the night of December 30, 1978. Shortly after 9:00 on that night, a police officer observed a brown, or brownish colored, pickup truck pursuing a red pickup truck in the general vicinity of the homicide scene. The brown truck was subsequently identified as the property of defendant. The red truck was owned by Charles Browning. An hour or two later the bodies of Browning and Joy Faulk were discovered in the truck which was parked in the driveway of Mrs. Faulk's former brother-in-law. Mitzi Faulk, six-year-old daughter of Joy Faulk, and her three-year-old sister, were passengers in Browning's truck at the time of the homicide. She told witnesses, and testified, that defendant, who was known as "Clicker" had followed them into the driveway of Jeff Faulk and shot her mother and Charles Browning. The murder weapon, a .25 caliber pistol, had been borrow-

ed by defendant from a friend, Terry Hill, a few days before the shooting occurred. he told Hill the pistol had been stolen. Sometime later, it was found by the roadside near defendant's home. While police officers were searching for him on the night of the homicide, they encountered him in his pickup truck near the driveway to his home. He fled, resulting in a high speed chase for some distance before he was apprehended.

Defense counsel exerted a diligent effort to show, among other theories, that animosity existed toward Joy Faulk on the part of Sam Faulk, her ex-husband, and that Shirley Browning, wife of Charles Browning, also had the motive and the incentive to commit the homicide. All of this evidence was laid out before the jury and was rejected by them in favor of the theory of the homicide presented by the State. A defense of present insanity at the time of the homicide also left the jury unconvinced.

It is not the function of an appellate court to reweigh evidence adduced at a criminal trial; a guilty verdict, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts of testimony in favor of the theory of the State. *State v. Hatchett,* 560 S.W.2d 627, (Tenn. 1978). The standard of review in an appellate court is to determine whether or not a rational trier of fact could have concluded beyond a reasonable doubt that the defendant was guilty of the offenses. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed2d 560 (1979); T.R.A.P. 13(e). This standard of review applies equally to the insanity defense. If the State's evidence was competent, and properly admissible we find it adequate and ample to support the jury's verdict. The question of the competency of all the State's proof is the subject of another assignment which will be dealt with in due order.

An issue of first impression in this State has been raised by defendant's claim of error in denial of a motion for bifurcated trial based upon his insanity defense. We have examined the authorities submitted by both the defendant and the State on this issue and find that such a procedure has been recognized in

only one isolated jurisdiction, either Federal or State. The United States Supreme Court has ruled there is no constitutional compulsion to require two-part jury trials. See *Spencer v. Texas,* 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). Tennessee does provide for a bifurcated proceeding on the issue of guilt and punishment when a jury returns a verdict of guilty in a first degree murder case. Neither legislative enactment nor case law otherwise provide for the conduct of such trials in this State, and in the absence of any showing of denial of fundamental fairness in the single jury procedure employed in this case, we do not find any deviation from such proceedings to be warranted.

Defendant says the indictment should have been dismissed because of the State's destruction of material evidence.

This homicide occurred on December 30, 1978. The two deceased were found in the pickup truck owned by Charles Browning, one of the victims. The police made a thorough examination of the truck, including a fruitless search for fingerprints. A few days later, the automobile was turned over to the widow of Charles Browning, and sometime later was evidently sold by her. The earliest indication of proceedings initiated by counsel in this case was a petition for habeas corpus filed on February 13, 1979, prior to defendant's indictment. On June 13, 1979 defense counsel filed a general motion for discovery. This motion was overruled prior to trial. Among other things found in the pickup truck were four (4) .25 caliber shell casings which the evidence showed were fired from a pistol borrowed by the defendant from one of the State witnesses. In their continuing investigation, the police later found a fifth .25 caliber shell casing on the ground, in the driveway at the scene of the homicide. It was developed at trial that this shell casing was lost by one of the investigating of officers prior to trial and before it had been submitted for examination to the crime laboratory. On July 16, 1979, a motion to dismiss the indictment due to the State's destruction of physical evidence was filed and denied. At

the conclusion of the State's proof defendant renewed the motion to dismiss the indictment because of the destruction of evidence involving the truck and the shell casing, and also moved for a judgment of acquittal based on the same issues. Indicating that there had been no evidence of any deliberate destruction or disposition of evidence the trial judge denied the motions. He held that defendant would be entitled to a hearing on said evidence at any time it could be produced.

We find no merit to defendant's contention. There is no indication in this record that any exculpatory evidence was withheld, destroyed, or concealed by the State. A motion for discovery must be explicit. See *United States v. Agurs,* 427 U.S. 97, 96 Supreme Court 2392, 49 L.Ed.2d 342 (1976). A broadside attack by a general motion in the hopes of finding some bit or piece of information in the State's possession is not justified. Defendant failed to make any timely request for exculpatory evidence, and, moreover failed to prove that any evidence held by the State at any time was exculpatory.

Defendant claimed prejudice due to an emotional outburst by the prosecutrix.

The trial had barely begun when, during the testimony of a sheriff's deputy, the record shows, "Prosecutrix Shirley Browning weeps audibly." Defense counsel immediately requested a bench conference in which he claimed prejudice because of her weeping. The jury was excused and the court admonished Mrs. Browning that could she not control her emotions and retain her composure, she would be required to leave the court room. A motion for mistrial was overruled. The trial judge stated his opinion that the audible sobs of the prosecutrix were not so unusual, inflammatory, or prejudicial as to warrant such action. After studying the record, we have reached the same conclusion. It was a natural expression of grief which was not repeated. No cautionary instruction to the jury was requested. The record does not contain any indication of an emotional demonstration of sufficient significance to warrant the trial judge taking any such action on his own volition.

Defendant asserts it was error to deny a motion to strike the testimony of the State's witness, Mitzi Faulk. In order to place this issue in tis proper context, we consider it beneficial to summarize the material evidence from the record.

Mitzi Faulk was the six-year-old daughter of Joy Faulk, one of the victims. The child and her three-year-old sister were passengers in the pickup truck owned by Charles Browning at the time he and her mother were purportedly shot by the defendant. The young witness was called to testify on behalf of the State. No challenge was raised prior to, or during, her testimony for any reason. It would be unnecessarily burdensome to repeat all of the testimony of the witness. It is sufficient to say that direct and cross-examination comprised some fifty-odd pages of the record. As related in the State's briefs, she demonstrated a remarkable ability to recall the events which occurred with specificity and to articulate detailed descriptions of the defendant, the clothing he wore, his personal appearance, the description of his vehicle and the various circumstances of the homicide. She also testified in some detail about events and conditions transpiring after the homicide occurred, although it was obvious from the testimony of other witnesses that at the time she was in a highly emotional state. The things she stated were corroborated by other witnesses who related res gestae statements made by the child immediately after the crime occurred, and by physical evidence wich fully supported here testimony. Defense counsel subjected the child to an intense and comprehensive cross-examination which involved her in what could have been construed as contradictions of her testimony. The trial judge allowed testimony of other witnesses to bolster the testimony of the child on the theory that her statements to them were spontaneous utterances and that her credibility had been impeached to some degree.

Defendant's attack on the admission of the testimony of this witness is two-fold. In the trial court, he moved to have the evidence stricken on the basis that the witness had been com-

pletely discredited and impeached and, on the basis that the State did not attempt to qualify her by showing her knowledge or understanding of the duty of an oath.

In this Court, it is first argued that the rule in Tennessee, as stated in *Ball v. State,* 188 Tenn. 255, (1948), is that a child under the age of fourteen (14) is not presumed competent, although a child of any age may be competent if possessed with the mental capacity and memory sufficient to be able to give a reasonable and intelligible account of the subject matter of his testimony. Also, he must have a reasonable appreciation of the difference between right and wrong, and comprehend the character, meaning and obligations of an oath. Defendant cites *Ball* specifically to assert the principle that "it is the duty of the court to examine the child witness in order to ascertain if he or she is competent." It is defendant's contention that under the authority of Ball, the trial judge had an affirmative duty to examine the child in this case and determine her competency based upon the criterion set out in that opinion. There is no doubt that this issue would have been resolved had the trial judge in this case proceeded with the examination of the witness before allowing her testimony, however, we do not agree with the insistence on behalf of defendant that the pre-testimonial examination is mandatory to establish a witness' competence, or that the trial judge should have launced such an examination sua sponte without some request for such an examination on behalf of the defendant. In *Vincent v. STate,* 50 Tenn. 120, (1871), cited by the *Ball* court, it was said that at the age of fourteen (14) years, a witness is presumed to have sufficient discretion and understanding to testify; under that age, such presumption does not arise; but the judge *usually* examines him to ascertain the degree of his understanding; and if the witness manifests, in the opinion of the judge, sufficient natural intelligence and understands the nature and obligation of an oath, he may be examined, whatever may be his age. (Citations omitted). In *Bright v. State,* 232 S.W.2d 53, (Tenn. 1950), the court made this comment:

> "It is next assigned as error that the Trial Judge made inadequate examination of the boy, Lloyd Harris, before allowing him to testify. Bearing in mind that the boy had testified on the first trial, after an examination which is not in the present record, and that at the time of the second trial, he was older and more mature, we cannot find any indication of any abuse of discretion by the Trial Judge, whose exclusive province it was to determine the capacity of the witness tendered, and in the absence of timely objection (the defendants made no objection in the present record), adequate examination and capacity to testify will be presumed. Logston v. State, 50 Tenn. 414; Burke v. Ellis, 105 Tenn. 702, 58 S.W. 855."

In *Burke v. Ellis,* 58 S.W. 855, 105 Tenn. 702 (1900), the issue was addressed in these words:

> "It is said the Court should have charged the jury, upon request made, that the child, being only seven years of age, was incapacitated to testify in the case. No objection was made to the child's testifying when he appeared as a witness, and the Court was not requested to test his capacity, and, it appears, was ocntent to let him give his statement. We must infer that the Court was satisfied, from his appearance, manner, and the matter of his testimony, that he was competent and intelligent enough to give his statement."

In *Franks v. State,* 213 S.W.2d 105, 187 Tenn. 174 (1948), our Supreme Court had this to say on the issue of the competence of a seven-year-old child:

> "It is next insisted that the trial judge was in error in permitting the seven-year-old daughter of deceased to testify. This little child was examined by counsel and upon her examination, in answer to a question as to what becomes of children who do not tell the truth, made the statement that they did not go to Jesus. We think this evidence shows a

> recognition of a state of future punishments and rewards. We have no case in this State directly in point, but we quote from the case of Wheeler v. United States, 159 U.S. 523, 525, 16 S.Ct. 93, 40 L.Ed. 244, 247, as follows: 'The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous.' . . .
>
> ". . . In the present case, the trial judge had the little girl before him and uld judge of her intelligence. After all, the personal observation of a child of tender years furnished the safest guide to its ability to testify, and we are of opinion that the trial judge did not abuse his discretion in permitting the little girl to testify."

In *Arterburn v. State* 391 S.W.2d 648, 216 Tenn. 240, our Supreme Court explicitly said:

> "Where no objection to the testimony of a child is made, adequate examination of the child and capacity to testify will be presumed and the trial judge will not be put in error for refusing a special request to charge that due to the youth of the witness he was incapacitated to testify. *Bright v. State,* 191 Tenn. 249, 232 S.W.2d 53 (1950); *Burke v. Ellis,* 105 Tenn. 702, 58 S.W. 855 (1900)."

We have spoken about the character of the testimony of the witness under the first test of her competency, that is her intelligence, her ability to recall and relate accurate impressions of the facts to which her testimony related, as well as her obvious candor in responding to the questions put to her. We are equally satisfied with her sensitivity to the obligation to tell the truth

under oath. We have assiduously reviewed the record where contradiction in her testimony occurred. It is plain that much of this occurred as the result of the nature of the examination by defense counsel. Her answers, where they appeared contradictory, were susceptable of different interpretations. The mere fact of the contradictions as they existed, did not render the testimony incompetent, or inadmissible, but goes only to her credibility. We find, as did the court in *Logston v. State, supra,* the witness, Mitzi, to be a competent witness. In the Logston case, the court made these comments:

> "James Galloway, a witness, about eight years of age, was objected to because of his tender years and for want of proper instruction. The court asked the witness if he knew what would become of him if he swore a lie? He said, 'Yes, the bad man will get me.' He was then asked who told him so. He said his mother. While, as a general rule, it might have been proper to have further tested the witness, yet, in view of his remarkably intelligent testimony, we are satisfied the manner of the child was of a character to satisfy the court of his capacity and instruction, and justified the brevity of examination by the court. The sensible answers make it clear that the witness understood sufficiently the nature of an oath and had a well defined idea of future rewards and punishments. His candor in speaking of his testimony, given on former trials, discovers an honesty the absence of which in many older and more mature persons, is to be regretted."

Defendant objected at the trial level to the restriction of his cross-examination of the child witness, Mitzi Faulk. It appears that in the course of his cross-examination, he endeavored to inquire from the child relative to an alleged charge of sexual abuse by her father, Sam Faulk, on the theory that Sam Faulk had committed the homicide of his former wife and Charles Browning as a result of those charges. The trial judge ruled that he could pursue this theory of the defense through other witnesses

but not through cross-examination of the child. Defense counsel's citation of *Green v. State,* 154 Tenn. 26, 285 S.W. 554 (1926) is correct. It is a legitimate defense tactic to show that another had perpetrated the crime for which he was accused and introduce any proof legitimate to establish that fact which would be legal against the individual if he had been on trial for the offense. However, the trial judge did not deny defendant the privilege of introducing any evidence whatsoever of that nature, but merely limited him in his cross-examination of the six-year-old child about sexual molestation by her father because it would be detrimental to her. The scope of cross-examination is a matter of discretion on the part of the trial court subject to reversal only if the Appellate Courts find plain abuse of that discretion. *Evans v. State,* 557 S.W.2d 927, Tenn. Crim. Appeals (1977). We do not find such abuse of discretion.

It is complained the court erred in failing to require the State to produce statements of witnesses and/or failing to grant sanctions against the State for not doing so.

The first reference in the record relative to this issue appears to be in regard to the testimony of the witnesses Jennie Browning and Junior Davis. In reviewing this issue we note the trial judge earlier had made the comment, in reference to the possible existence of a statement of a witness, that Rule 16 did not apply if the District Attorney General had never had such a statement in his possession. We certainly do not believe His Honor meant to imply that a statement appropriate for discovery was not in the State's possession simply because it was still physically held by a Peace Officer witness.

At the conclusion of the State's examination of the witness, Jennie Browning, defense counsel began cross-examination without moving for production of any statement of the witness in the State's possession relating to the subject matter of her direct testimony. Shortly after he began cross-examination, he inquired of her if she had given a statement to the police. Upon an affirmative reply, counsel requested to see the statement.

The District Attorney General presented to the court the notes of the conversation between the witness and several law enforcement officers who were engaged in conversation with her. The court directed these notes be made available to defense counsel, and copies made for his use.

Defendant claimed a violation of Rule 16(a)(1)(A) and (E). We find no merit to his complaint. We have experienced some difficulty in analyzing this complaint because of failure of counsel to make appropriate references to the record in accordance with Rule 27 of the Rules of Appellate Procedure. However, regarding defendant's assertion of error in denial of a mistrial based upon the failure of the State to reveal or make available to defense counsel in advance of trial any statements alleged to have been made by defendant, we have not been able to determine from this record that any such statement was made by the defendant. The same is equally true regarding defendant's request for statements made by Jennie Browning and Junior Davis. There were no statements, which could be defined as such under Rule 16, taken from either of these witnesses. The trial judge allowed defense counsel to examine the investigating officer's notes taken during conversations with Mrs. Browning. The District Attorney General informed the court he did not have any notes relating to the interview with Mr. Davis. The court ruled that work notes were not subject to the disclosure rule. We reiterate for the benefit of Bench and Bar that if any relevant, written, or recorded statements coming within the scope of the Rule are in the possession, custody or control of the State, whether in the hands of the District Attorney General, or some other investigating officer, they are subject to the Rule and must be produced.

We also overrule defendant's complaint of error due to comments made by the trial judge in the course of the trial. As our Supreme Court said in *Brooks v. State*, 213 S.W.2d 7, 187 Tenn. 67 (1948), "A trial judge should be very careful and not give expression to any thought that would be calculated to lead

the jury to infer that his opinion was in favor (sic) or against the defendant in a criminal trial." In this case, the learned trial judge made a comment that does not merit repetition because it was not the sort of statement which was likely to influence the jury. He subsequently explained to the jury the reason for his remarks, apparently to assure that they were not improperly influenced by what he had said. We find no prejudice to the defendant.

Defendant claims that the trial judge allowed the prosecutor to elicit testimony concerning defendant's statements to the State psychiatrist but denied defense counsel the opportunity to cross-examine on the same matter. Defendant complains of examination of its expert witness by State's counsel relative to events which occurred earlier in the day of the homicide. The trial judge ruled that neither the State nor the defense would be permitted to admit into evidence anything defendant told a doctor relative to the crime itself. Subsequently, defense counsel endeavored to cross-examine the psychiatrist relative to the truth of defendant's statements about the period of time the homicides purportedly took place. The trial judge properly limited the cross-examination in that regard. He properly ruled that if defense counsel opened the door, the State would be permitted to also inquire about defendant's statements concerning the time of the homicides. We find no error in this ruling.

Prejudicial error is attributed to the District Attorney General in his closing argument. In cross-examination of a State witness, Sylvia Hillis Barrett, defense counsel couched his questions in professional terms and received responsive answers from the witness. In his closing argument, the District Attorney General commented about the similarity between her answers and those given by an expert psychiatrist and he speculated on how she could be so informed. The comment was improper. There was no indication the witness had been coached. However, the argument followed the evidence and we find no prejudice to the defendant. We find that the comments did not

improperly affect the jury verdict. See *Judge v. State*, 539 S.W.2d, 340, (Tenn. Crim. Appeals 1976); *State v. Sutton*, 562 S.W.2d 820, (Tenn. 1978).

The second comment about which complaint was made was obviously an inadvertent statement on the part of the State's attorney where he confused the words defendant and witness. It certainly did not prejudice the jury.

We note in the first instance that there was no simultaneous objection; ultimately, defense counsel did raise an objection, however, he declined to have the court to give an appropriate instruction. We do not find any prejudice to the defendant from the remark.

The remainder of the issues raised are in reference to the jury instructions. First, the defendant submitted numerous instructions, a number of which related to the insanity defense and diminished capacity on the part of the defendant, which would negate his ability to form the requisite intent for a finding of First Degree Murder or the malice required for the commission of Second Degree Murder. We have examined defendant's brief and find it refers specifically to six (6) of the special requests. Of these, we find that four (4) are improper statements of law, and the other two (2) were covered adequately in the general instructions to the jury delivered by the trial judge. A specially requested instruction shall not be given unless that request is trictly accurate as to the law and applicable to the facts and issues in the case. *Cooper v. State*, 138 S.W. 826, 123 Tenn. 37, (1911). *Raine v. State*, S.W. 189, 143 (Tenn. 168, (1928). There is no error in denial of a requested instruction which is covered by the court's general charge. See *Edwards v. State*, 540 S.W. 2d 641 (Tenn. 1976); *Crafton v. State*, 545 S.W.2d 437 (Tenn. Crim. Appeals 1976). The trial judge properly and adequately instructed the jury on all of the elements of the insanity defense and we do not find error in the instructions.

Defendant complains of the jury instruction on the failure of one to produce a witness who was solely available to that party.

Initially we note that defendant failed to make a contemporaneous objection to the instruction, which constitutes a waiver of the issue. See *Pope v. State,* 528 S.W.2d 54, Tenn. Crim. Appeals (1975); *Mellons v. State,* 560 S.W.2d 634, (Tenn. Crim. Appeals (1977). Nonetheless, the jury instruction was wholly impartial and did no more than inform the jury that the failure of either the State or the defendant to call a witness who was peculiarly available to that particular party could raise an inference that the absent witness' testimony would be adverse. Such an inference is permissive and does not raise any mandatory requirement on the part of the jury. We do not find error.

Defendant also raises the question of the jury instructions concerning the presumption of malice. He says the instruction given by the court shifted the burden to defendant to rebut the presumption of malice. It is contended this procedure allowed the jury to determine the element of malice upon defendant's failure to rebut the presumption rather than upon the evidence, and this was a denial of due process. *Sandstrom v. Montana,* 442 U.S. 510, 99 Supreme Court 2450, 61 L.Ed.2d 39 (1979) is the authority upon which defendant relies. Sandstrom was a case in which the State Court Judge instructed the jury that a person is presumed to intend the ordinary consequences of his voluntary acts. The United States Supreme Court held that because the jury may have interpreted the presumption as conclusive or as shifting the burden of persuasion, and because either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt, the instruction given was unconstitutional. We do not have such an instruction in this case. The Trial Judge in this case, specifically instructed the jury that the defendant is presumed innocent, and the burden is on the State to prove his guilt beyond a reasonable doubt. He reiterated in several instances that the burden of proof was upon the State and the measure of the evidence was

beyond a reasonable doubt. Upon the specific element of malice, the jury was particularly instructed:

> "The question of whether the alleged killing was done with malice is for you to determine from the entire case, and you should look to all of the facts and circumstances developed by the evidence to determine whether the State has proven beyond a reasonable doubt the existence of malice. If you have a reasonable doubt as to whether the alleged killing was done with malice, then the defendant cannot be guilty of murder . . . and you must acquit him of that offense."

As this court said in *Armes v. State*, 540 S.W.2d 279, (Tenn. Crim. Appeals 1976):

> "The instruction complained of merely told the jury that the use of a deadly weapon in a homicide raised a presumption of malice which would support a verdict of second degree murder unless other facts and circumstances rebutted this presumption. This instruction did not place upon the defendant the burden of proving the absence of malice. Unlike *Mulaney*, (Mulaney v. Wilbur, 421 U.S. 684, 95 Supreme Court 1881, 44 L.Ed.2d 508 1975), the charge placed no burden upon the defendant to prove any element of the offense. It did not require the defendant to present other facts and circumstances, or any evidence to rebut the presumption. Certainly, the jury could consider any proof offered by the defendant and/or his witnesses in deciding if the presumption had been rebutted, but it also could look to all the State's direct proof, the proof elicited upon cross-examination of the State's witnesses, and every other fact and circumstance in the case in deciding the issue."

The presumption stated by the trial judge is not the sort of inference adjured against in Sandstrom, supra, or any of its predecessors. It is a form utilized in criminal cases, created in the common law, to provide guidance for juror's thinking in

considering the evidence laid before them. See *County Court of Ulster County v. Allen,* 442 U.S. 140 99 Supreme Court 2213 60 L.Ed.2d 777 (1979), Powell, Justice, dissenting.

There is a further reason why there is no basis for defendant's complaint with the jury instructions on this issue which is brought out in his appellate brief. His defense was that he did not commit the crimes, had no knowledge of the events whatsoever, and to the contrary, he sought to show through cross-examination of the State's witnesses that the crime was actually committed by the former husband of the woman victim. He offered medical evidence to show that he was not guilty by reason of insanity. This defense was a valid one, and if accepted by the jury, precluded any guilt on his part whatsoever.

We are constrained to say that defendant has been very ably and competently represented in this case, however, we do not find error in the trial proceedings and affirm the judgment of the trial court.

CHARLES H. O'BRIEN, JUDGE

CONCUR:

Martha Craig Daughtrey, Judge

Jerry Scott, Judge

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Rutherford County
C.C.A. No. 79-106-III

State of Tennessee,
Plaintiff-Appellee,

v.

Stanley Barham Clark,
Defendant-Appellant.

ORDER

Upon consideration of the application for permission to appeal filed by the Appellant and the answer of the Appellee, the briefs of counsel and the entire record, the Court is of the opinion the application for permission to appeal should be and the same is hereby denied. We concur in the decision of the Court of Criminal Appeals in result only.

Costs will be borne by the Appellant.

PER CURIAM